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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY SEAN TATE FOR JUDICIAL REVIEW

AND IN THE MATTER OR A DECISION OF THE CIVIL LEGAL SERVICES APPEAL PANEL

KEEGAN J

Introduction

[1] The applicant in this case is a sentenced prisoner presently detained in HMP Magilligan. The applicant applied for legal aid in order to challenge a decision of a governor of the prison to suspend his pre-release testing by way of judicial review. This application was refused by the Legal Services Agency by letter of 12 September 2019. That decision was appealed and upon consideration The Civil Legal Services Appeal Panel ("the panel") refused the appeal by letter of 24 September 2019. That is the decision which is under challenge in this case.

[2] The matter was listed for a hearing on 4 November 2019. Ms Lara Smyth BL appeared on behalf of the applicant and Ms Laura McMahon BL appeared on behalf of the respondent. I am grateful to both counsel for their helpful oral and written submissions.

Factual Background

[3] The applicant has filed an affidavit which is dated 16 October 2019 in which the factual background is found as follows. The applicant explains that he is serving an indeterminate custodial sentence for robbery and other related matters. His custodial tariff was set at 6 years and he became eligible to apply to the Parole Commissioners for Northern Ireland ("PCNI") for release in 2016. The applicant states that he has served over 9 years in custody and has not achieved a release date despite various attempts before the PCNI. The applicant appeared before the PCNI

on 31 May 2019. In his affidavit he states that the PCNI were aware of the new charges against him. In a written decision dated 6 June 2019 the PCNI did not recommend release but did recommend pre-release testing.

[4] In relation to pre-release testing the applicant states in his affidavit that he commenced pre-release testing in October 2017 by way of accompanied temporary release. He was granted a period of compassionate temporary release on 27 January 2018 to attend a funeral. However, he absconded when availing of the compassionate release, remained unlawfully at large until 4 February 2018, and was subsequently charged with committing a number of new offences during this period, namely robbery, possession of an offensive weapon, criminal damage and common assault. The applicant denies these offences. He was also charged with being unlawfully at large during the period of time referred to above to which he pleaded guilty and was sentenced to a period of imprisonment.

[5] The applicant then confirms that he was committed for trial in the Crown Court in relation to the new charges by the Magistrates Court on 2 August 2019 (given the indictable nature of the offences). The applicant avers that despite the new charges he continued to avail of pre-release testing up until his committal date. He states that he availed of an accompanied temporary release on 30 July 2019. However, it appears that in August 2019 there was an issue with one of the bail conditions that had been imposed by the Deputy District Judge at the committal. The case made by the applicant is that he was told by the governor that this bail condition prevented him from availing of pre-release testing. The applicant then states that when the bail condition was removed by the Crown Court judge with the consent of the PPS, he was then told that the committal to the Crown Court had changed the governor's view and that he was now being removed from the pre-release scheme. This is the core of the applicant's case as the applicant challenges the governor's decision to remove him from the pre-release scheme on the basis of his committal to the Crown Court for trial on indictable offences.

[6] This case was reiterated in pre-action correspondence sent on the applicant's behalf which is dated 15 August 2019. The decision under challenge is described as "the decision of NIPS to refuse to comply with the directions of the PCNI and to arbitrarily suspend pre-release testing from 15 August 2019." A detailed reply was forwarded from the NIPS dated 3 September 2019. Contained within this reply the following paragraphs are found:

> "NIPS completely refute that such a decision was taken. PCNI did not direct pre-release testing on 31 May 2019, rather it was one of a number of recommendations that were made concerning the applicant. This was recommended subject to the usual risk assessment. Decisions regarding periods of temporary release are matters for NIPS, taking into account all relevant factors on a prisoner specific basis.

> It is the belief of the Governors, taking into consideration their extensive personal knowledge of the applicant, that knowing that he has to face a Crown Court trial presents a significant risk in altering the applicant's mind set and make him more susceptible to impulsive behaviour, behaviour which the applicant displayed when he was on compassionate temporary release in January 2018, after which he went unlawfully at large and allegedly committed the offences for which is now committed for trial.
>
> NIPS, however, remain cognisant of the need to remain flexible to the dynamic nature of criminal proceedings and will respond to any developments in that regard which may impact on any future assessment regarding temporary release.
>
> Accompanied Temporary Releases would not be an option at this stage however Foyleview would afford a vehicle for preparation in his release plan. The applicant needs to reduce his risk and this is by far the best option for him. Progression to Foyleview after that would be the most appropriate option.
>
> The Governor believes that the applicant is now at greater risk of flight to the extent that to allow him to continue on temporary release testing would be a risk NIPS are not able to manage at the present time, unless and until further risk assessments are able to be carried out in response to a change in circumstances."

[7] The applicant then applied for legal aid to pursue his case. The application was supported by a positive opinion from experienced counsel Mr Stephen Toal BL that the applicant should be entitled to legal aid funding to facilitate him in applying for leave to apply for judicial review.

The judicial review challenge

[8] The Order 53 contains three grounds of challenge as follows:

(i) Procedural unfairness in that the applicant contends that the impugned decision was procedurally unfair as the respondent failed to provide adequate, proper and intelligible reasons for its decision.

(ii) The applicant contends that the impugned decision is vitiated by the proposed respondent's failure to comply with the statutory duty or requirement pursuant to Regulation 28 of the Civil Legal Services (Appeal) Regulations (Northern Ireland) 2005.

(iii) The applicant contends that the impugned decision was irrational in the *Wednesbury* sense.

Grounds one and two condense into a procedural challenge regarding reasons and the second aspect of this case is a broad irrationality challenge.

The Legislative Framework

[9] The starting point is Article 11 of the Access to Justice (Northern Ireland) Order 2003 ("the Order").

> "11(1) Civil legal services shall be funded by the Department out of money's appropriated for that purpose by Act of the Assembly.
>
> (2) In funding civil legal services the Department shall aim to obtain the best possible value for money."

Article 14(2)(a) of the Order also states that a grant of representation for an individual for the purposes of proceedings:

> "(a) Shall not be made unless the individual shows there are reasonable grounds for taking defending or being a party to proceedings; and
>
> (b) may be refused if in the particular circumstances of the case it appears unreasonable that representation should be granted."

[10] The Civil Legal Services Appeal Regulations (NI) 2015 ("the Regulations") formalised a new scheme for adjudication of legal aid claims. Regulation 27 provides that an appeal panel shall have the same powers as the Director under Article 14(2)(a)(1) of the Order. Regulation 43 provides as follows:

> "43.—(1) Subject to paragraph (2), an application for a certificate under this Part shall not be granted unless—
>
> (a) it is shown that there are reasonable grounds for taking, defending or being a party to the proceedings to which the application relates;

> (2) An application for a certificate under this Part may be refused if, in the circumstances of the case, it appears to the Director—
>
> (a) to be unreasonable that a certificate should be granted."

[11] Regulation 28 imposes a statutory obligation on the panel to provide reasons for its decision as follows:

> "28.—(1) Every decision of an appeal panel (including any decision by the presiding member to allow oral representations) shall be recorded by the presiding member, together with the reasons for that decision, and shall be referred to as a decision notice."

The decision making correspondence in relation to the refusal of legal aid

[12] The first decision making letter is dated 12 September 2019 from the Legal Services Agency. It states as follows:

> "Your request is being considered and I have to inform you that a decision has been made to refuse the request for the following reason(s): it has not been shown that there are reasonable grounds for taking, defending or being a party to the proceedings and, in the particular circumstances of the case, it appears unreasonable that a certificate should be granted.
>
> It is considered that you have not shown an arguable case or sufficient interest in the proceedings."

This correspondence then refers to the right of appeal and following from that further material was submitted by the applicant including a statement of reasons for appeal and counsel's opinion.

[13] The second decision making letter is that of the Civil Legal Services Appeal Panel and it is dated 24 September 2019, it states as follows:

> "I refer to the appeal submitted to the Legal Services Agency Northern Ireland (LSANI) against the refusal to grant funding and wish to inform you that this appeal was considered by the Civil Legal Services Appeal Panel on 24 September 2019 and was refused on the following grounds: it has not been shown that there are reasonable grounds for taking, defending or being a party to the

> proceedings in the particular circumstances of the case, it appears unreasonable that a certificate should be granted. The decision of the LSANI set out in the letter dated 12 September 2019 is upheld. Taking account of the contents of the application, the panel do not consider that the application for judicial review of the NIPS decision has good prospects for success."

The letter goes on to state that there is no appeal against the refusal of the Civil Legal Services Appeal Panel hence this claim for Judicial Review.

[14] The applicant's solicitor sent pre-action correspondence of 23rd September 2019 in relation to the refusal of legal aid and within that letter the nub of the claim is described that:

> "PCNI specifically raised the issue of a Crown Court trial in their decision and still recommended that NIPS allow Mr Tate to engage in pre-release testing which was regarded as vital by PBNI and psychology."

The pre-action response is dated 9 October 2019. In relation to the irrationality challenge this letter states that no unlawfulness or irrationality has been identified. Reference is made to the wide discretion allowed to the decision maker. In relation to the reasons challenge the respondent states that the reasons were more than adequate to meet the obligations and that no prejudice was occasioned to the applicant.

[15] I also received an affidavit on the day of hearing sworn by the Presiding Member of the appeals panel sworn on 4 November 2019. I pause to observe that this evidence was voluntarily produced. It is of course not mandatory upon decision making bodies to file evidence however in my view it is a proper and helpful course to take when a claim of irrationality is made as here. Ms McMahon contended that it was quite proper to file an affidavit from the Presiding Member of the Appeals Panel given that this case involved an irrationality challenge. Ms Smyth also referenced this affidavit and whilst not objecting in principle to this evidence she cautioned against the court allowing *ex post facto* reasoning. Drawing from paragraph 16 of her skeleton argument, Ms Smyth also suggested that the contents of the affidavit highlighted material mistakes as to fact which should render the decision irrational.

[16] The affidavit filed by the Presiding Member states that the "the decision reached by the Panel was based on evidence found in the application assessed within the applicable legislative framework. The Presiding Member confirms that the panel considered all of the papers in the case and in particular the pre-action protocol correspondence and counsel's opinion. The Presiding Member points out that there was some conflict between counsel's opinion and the Governors pre-action reply. The Presiding Member also sets out the panel view that "the governor has set

out the position in a reasoned and measured way and that the panel could find no evidence that the decision of the Governor was unreasonable or irrational." The conclusion of the panel is found at paragraphs 10-13 of the affidavit which states that:

> "13. In the circumstances the panel decided that the applicant's proposed challenge did not have sufficient merit and did not have good prospects of success. The panel consider it would be unreasonable to grant legal aid in these circumstances."

The arguments

[17] In her well-structured and formulated submissions Ms Smyth contended that the reasons given, whilst to an informed audience, do not actually comprise reasons rather they are a statement of the statutory tests. She therefore argued that the reasons challenge should succeed in this case and that if this were so the court does not need to consider the other aspect of this case. In the alternative Ms Smyth stated that the impugned decision was clearly irrational as it was an arbitrary refusal of pre-release testing in circumstances where it had taken place after the laying of criminal charges but before committal.

[18] In reply Ms McMahon argued that the public authority in this instance should not be compelled to give substantial reasons for a decision of this nature. Ms McMahon reminded the Court that an irrationality challenge of this nature faces a substantial hurdle. She said that in any event there was no clear exposition of public law unlawfulness set out in this case.

Consideration

[19] I remind myself that this is a court of supervisory jurisdiction. It is not for me to concern myself with the merits of administrative decision making. The context of the case is also important. In the case of *Neil Hegarty* [2018] NIQB 108 I dealt with a judicial review against a decision of the Civil Legal Aid Services Appeal Panel. In that decision I made the following comments at paragraph 13:

> "The substance of the case then comes down to a broad irrationality challenge. In that regard I bear in mind a number of things. Primarily, the adjudication is by a panel made up of a body of lawyers. They must obviously consider materials and apply the facts to the case applying a statutory test bearing in mind the overriding objective to protect the fund. It is for the applicant to show some grounds for appeal. There is clearly a wide discretion imparted to a decision maker in

> this context; a principle which was rightly not under serious challenge in this case."

[20] With that context in mind, I turn to the first argument- the reasons challenge. By virtue of Regulation 28 the obligation to provide reasons is now embedded in the legislative structure. The argument made by the applicant is that the panel failed to comply with its statutory obligation to provide adequate and intelligible reasons as the decision notice does not disclose how any of the issues of fact and law were resolved by the panel. In answering this part of the challenge I make a number of preliminary observations. First, as far as I can see this case involves factual issues rather than a point of law. However, if a case involved a point of law such as a limitation point there would be a requirement to deal with that in the decision notice. Second, the use of a decision *notice* reflects the reality that reasons will necessarily be succinct and focused given that this is an administrative process which requires to be managed efficiently to allow for the administration of justice. Third, the court should be cautious when considering *ex post facto* reasoning.

[21] It is clear to me that this reasons challenge comes down to a consideration of the adequacy of the reasons. In the case of *South Buckinghamshire District Council v Porter No 2* [2004] UKHL the court said that reasons must enable "the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved." However, that was a planning case and so the context differs from here. What is adequate will inevitably depend on the subject matter of a case and the nature of the tribunal. Also a court must bear in mind that the requirements for reasoning cannot stretch to onerous limits. It is therefore difficult to apply any precise or uniform standard. In *Re Adam's Application* 7 June (Unreported) citing *Stefan v General Medical Council* [1999] 1 WLR at 1304 where Lord Clyde stated:

> "In many cases very few sentences should suffice to give such explanation as is appropriate in the particular situation."

[22] In *Waide's Application* 2008 NICA 1 Kerr LCJ stated that:

> "In that case it was held that the reasons for a decision had to be intelligible and adequate and that they should enable the reader to understand what conclusions were reached on the principal issues; that they could be briefly stated, the degree of particularity depending on the nature of the issues; that they should not give rise to doubt whether the decision-maker had erred in law, but adverse inferences would not readily be drawn; that the reasons did not need to refer to more than the main issues and should be read in a straightforward manner,

> recognising that they were addressed to parties familiar with the issues and arguments; and that for a reasons challenge to succeed the aggrieved party had to satisfy the court that he had been substantially prejudiced by the failure to provide an adequately reasoned decision."
>
> "We are satisfied however that what she was entitled to was a statement of the reasons for dismissing her application rather than an exposition of the reasoning by which that decision was reached."

[23] I have also been referred to the dicta of Deeny LJ in *Re Osborne's Application* [2018] NIQB 44 at paragraph 14 where he said:

> "It is wrong to parse the decision recording letter of a public authority as if it were an act of Parliament. If judicial review courts were to adopt that approach they would effectively require decision-makers to write letters as if they were an act of Parliament. Acts of Parliament, of course, are subjected to the most careful and lengthy scrutiny, at least normally if not in times of emergency, and scrutiny from a wide range of lawyers and laymen. Subordinate statutory provisions similarly are subject to lengthy consultation and consideration. It is important to avoid paralysis in the public service that the courts do not quash decisions of decision-makers because a sentence in a paragraph might have been expressed better or differently."

[24] Of course I am dealing with a different problem from that highlighted in *Osborne's* case. Here the reasons given for the refusal are expressed in terms of the statutory test with a conclusion that the panel did not consider the case to have "a good prospect of success." This issue was not specifically raised by counsel but I query whether "good prospects of success" is in fact the correct legal test. It is certainly confusing to have that phrase appear alongside the statutory test of "reasonable grounds" for taking proceedings which is also contained in the decision notice. In any event, the reasons are not sufficient to meet the minimum standard of adequacy given the issues raised by counsel in this case. By contrast, in the *Hegarty* case the applicant did have a clear view as to why legal aid was refused, set out in three short sentences. I do not suggest that reasoning has to be substantive but it should deal with the core issues in a sentence or two and not simply recite the statutory test.

[25] The affidavit now provided does expand on the reasons and I do not rule out that in certain circumstances this may suffice. However, in this case, Ms Smyth has highlighted material errors in the panel's decision making process which mean it

simply cannot be corrected at this stage. In particular paragraph 10 of the affidavit raises a valid doubt in my mind that the panel misunderstood the chronology of the case in relation to the applicant's accompanied temporary release. Hence, Ms Smyth has comfortably established an arguable case and subject to any further submissions I am minded to quash the decision on the procedural ground. That is sufficient to deal with this case.

[26] Whilst I am mindful that some urgency must be applied I will allow a short pause before finalising the case to allow the parties to consider the points I have raised. I have decided this case on its own specific facts but I am conscious that some points may have wider application in terms of the legal test and practice and procedure. These are matters which may arise again and I am keen to avoid unnecessary challenges coming before the court in this area. In terms of good practice, I also raise the point that panels need to be fully informed given the nuances of different areas of law. In this case the PCNI decision may well have been of assistance. I have great sympathy for panels, working to deal with a large number of cases, when it is difficult to get to grips with the full picture. I will therefore allow a couple of days for the parties to consider my ruling before I finalise the case and deal with the question of relief.

Conclusion

[27] Subsequent to the delivery of my judgment it was agreed that the decision should be quashed and that the matter would be heard by a differently constituted appeals panel. The respondent has also sent correspondence to the court dated 13 December 2019 which states that following my ruling a discussion between relevant stakeholders has taken place and will continue with proposed outcomes including, but not limited to, developing templates addressing the key requirements of decision making, ensuring compliance with the legislative framework governing appeals to appeal panels and a clear exposition of the reasons for decisions reached by those panels. I was not asked to give any further guidance at this time. I am encouraged that improvements will be made to the system and I am grateful to all of the relevant stakeholders for engaging in this process of review.